

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN

UNITED STATES OF AMERICA,)	
)	
)	
Plaintiff,)	
)	
v.)	
)	
GELEAN MARK,)	
VERNON FAGAN,)	Criminal No. 2006-80
WALTER ELLS,)	
DORIAN SWAN,)	
KELVIN MOSES,)	
HENRY FREEMAN, and)	
EVERETTE MILLS,)	
)	
Defendants.)	
)	

ATTORNEYS:

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St. Thomas, U.S.V.I.
For the plaintiff,

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St. Croix, U.S.V.I.
For defendant Gelean Mark,

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For defendant Vernon Fagan,

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For defendant Dorian Swan,

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For defendant Kelvin Moses,

Dale L. Smith, Esq.
New York, NY
For defendant Henry Freeman,

Arturo R. Watlington, Jr., Esq.
St. Thomas, U.S.V.I.
For defendant Everette Mills.

MEMORANDUM OPINION

GÓMEZ, C.J.

Before the Court are the motions of defendants Gelean Mark ("Mark) and Vernon Fagan ("Fagan") to dismiss the indictment on double jeopardy grounds.

On December 19, 2006, the Grand Jury returned an indictment¹ against Mark, Fagan, and seven other co-defendants in this Court. The matter was assigned Criminal No. 2005-76 (hereinafter "Redball One"). Count One of the Redball One indictment states:

Beginning from a time unknown, but no later than November 2004, and continuing until November 2005, at St. Thomas in the District of the Virgin Islands and elsewhere, defendants Gelean Mark, Vernon Fagan, aka "Culture," . . . did knowingly and intentionally, combine, conspire, confederate,

¹ Technically, the document returned by the Grand Jury on December 19, 2006, in Criminal No. 2005-76 was a second superseding indictment. That document replaced the original indictment in that matter.

and agree together with each other and with diverse other persons to the grand jury known and unknown, . . . to knowingly and intentionally possess with intent to distribute controlled substances

(Indictment 1-2, Crim. No. 2005-76, Dec. 19, 2006.). The controlled substances underlying the conspiracy in Count One included cocaine, cocaine base ("crack"), and marijuana. Count Eighteen of the indictment in Redball One states:

Beginning from a time unknown, but no later than November 2004, and continuing until November 2005, at St. Thomas in the District of the Virgin Islands and elsewhere, defendants Gelean Mark [and] . . . Vernon Fagan . . . did knowingly and intentionally, combine, conspire, confederate, and agree together with each other . . . to import controlled substances into the United States from a place outside thereof

(*Id.* at 8.) The conspiracy charged in Count Eighteen involved the importation of cocaine and crack.

Also on December 19, 2006, the government filed a separate indictment in this Court against Mark, Fagan, and seven other co-defendants, in a matter given Criminal No. 2006-80 (hereinafter, "Redball Two"). Aside from Mark and Fagan, none of the co-defendants named in Redball One were named in Redball Two. Count One of the indictment filed in Redball Two alleges:

Beginning from a time unknown, but no later than 1999, and continuing until October, 2005, at St. Thomas in the District of the Virgin Islands and elsewhere, defendants Gelean Mark [and] . . . Vernon Fagan . . . did knowingly and

intentionally, combine, conspire, confederate, and agree together with each other and with diverse other persons to the grand jury known and unknown, . . . to knowingly and intentionally possess with intent to distribute a controlled substance

(Indictment 1-2, Crim. No. 2006-80, Dec. 19, 2006.) Count Two of the Redball Two indictment states:

Beginning from a time unknown, but no later than 1999, and continuing until October 2005, at St. Thomas in the District of the Virgin Islands and elsewhere, defendants Gelean Mark [and] Vernon Fagan did knowingly and intentionally, combine, conspire, confederate, and agree together with each other and with other persons known and unknown to the grand jury . . . to knowingly and intentionally import into the United States from . . . Tortola, British Virgin Islands, controlled substances

(*Id.* at 7.) The only controlled substance allegedly involved in Redball Two was cocaine.

The trial in Redball One commenced on March 5, 2007. The parties rested and the matter went to the jury after approximately three weeks of trial. During the second day of deliberations, the jury sent the Court a note indicating they were deadlocked and could not reach a unanimous verdict with respect to the defendants on Counts One and Eighteen of the Indictment. After consulting with counsel, the Court instructed the jury to deliberate further (the "Allen charge"), consistent with *Government of the Virgin Islands v. Gereau*, 502 F.2d 914,

935-36 (3d Cir. 1974). The jury deliberated for one more day. The Court then received another note indicating that the jury was still unable to reach a unanimous verdict on Counts One and Eighteen.

On March 27, 2007, the Court declared a mistrial in this matter. The Court found that manifest necessity required such a declaration, given that the jury was unable to reach a unanimous verdict on Counts One and Eighteen. On April 13, 2007, one of the defendants in Redball One filed a notice of appeal to the Third Circuit.

The trial in Redball Two is scheduled to begin on September 5, 2007.

II. DISCUSSION

The Double Jeopardy Clause protects criminal defendants from later prosecutions for the same offense. See U.S. CONST. amend. V ("[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb."). Double jeopardy bars successive prosecutions where "the two offenses charged are in law and in fact the same offense." *United States v. Felton*, 753 F.2d 276, 278 (3d Cir. 1985); cf. *United States v. Felix*, 503 U.S. 378, 387, 112 S. Ct. 1377, 118 L. Ed.2d 25 (1992) ("[A] mere

overlap in proof between two prosecutions does not establish a double jeopardy violation.").

In a jury trial, Double Jeopardy rights do not attach until the jury is empaneled and sworn. *Gómez v. United States*, 490 U.S. 858 (1989). However, the Double Jeopardy Clause will not bar successive prosecutions for the same offense where a mistrial is required by "manifest necessity." *United States v. Rivera*, 384 F.3d 49, 53 (3d Cir. 1991); see also *United States v. Console*, 13 F.3d 641, 663-64 (3d Cir. 1993) (explaining that Double Jeopardy will not bar the re-prosecution unless the issue has been "necessarily determined in the defendant's favor by a valid and final judgment").

III. ANALYSIS

Mark and Fagan argue that the indictment filed in Redball Two should be dismissed because it contains the same charges and underlying facts as the indictment filed in Redball One.

It is true that Double Jeopardy will bar a later prosecution if the totality of circumstances demonstrates that the conspiracies alleged in successive indictments are actually involved a single agreement. *United States v. Liotard*, 817 F.2d 1074, 1077-78 (3d Cir. 1987); see also *United States v. Smith*, 82

F.3d 1261, 1271 (3d Cir. 1996) ("The ultimate purpose of the totality of the circumstances inquiry is to determine whether two groups of conspirators alleged by the government to have entered separate agreements are actually all committed to the same set of objectives in a single conspiracy.").

Here, however, neither Mark nor Fagan was convicted or acquitted of the charges against them in Redball One. That trial ended in a mistrial. Therefore, even if the indictment in Redball Two charged Mark and Fagan with the exact same offenses as those charged in Redball One, the Double Jeopardy Clause would not prevent the government from re-prosecuting those charges. See, e.g., *id.* at 664-65 ("[I]nasmuch as a response to a special interrogatory regarding an element of a "hung" count is neither a "final" judgment nor a determination "necessary" to a final judgment, such a response would not preclude the government from relitigating"); see also *United States ex rel. Russo v. Superior Court of New Jersey*, 483 F.2d 7, 13 (3d Cir. 1973) ("'[m]anifest necessity' must be present ... for a trial judge to declare a mistrial and still preserve for the state the right to reprosecute a defendant.").

IV. CONCLUSION

For the forgoing reasons, the Court will deny the motions of Mark and Fagan to dismiss the indictment filed in Redball Two on Double Jeopardy grounds. An appropriate order follows.

Dated: September 5, 2007

S_____
CURTIS V. GÓMEZ
Chief Judge

Copy:

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